YEO HIAP SENG TRADING SDN BHD

v.

LIM LEE CHOON

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL NO: MT1-16-1-2003]
10 DECEMBER 2003

LABOUR LAW: *Employment - Dismissal - Misconduct - Meaning of - Whether there was misconduct warranting immediate dismissal without notice - Consequence of not raising 'misconduct' in letter of termination - Whether 'due inquiry' can be dispensed with - Requirements of a 'due inquiry' - Conduct of domestic enquiry, guidelines - Employment Act 1955, s. 14(1)*

WORDS & PHRASES: *"misconduct" - Employment Act 1955, s. 14(1) - Definition of - Failure to afford the requisite skill which has been expressly or impliedly promised - Breach of legal duty*

WORDS & PHRASES: *'due inquiry" - Employment Act 1955, s. 14(1) - Definition of - Domestic enquiry - Audi alteram partem - Right to fair hearing, to make representations against charges and to mitigate against punishment*

This was an appeal by the employer/company against the decision of the labour officer ordering it to pay the employee/claimant the sums of RM2,410.93 as salary in lieu of termination notice and RM23,074.62 as termination benefits. The company had earlier terminated the claimant's contract of service without notice on the ground of misconduct, to wit, failing to meet his sales targets. The claimant had been in the employ of the company for almost 24 years.

For the company, it was argued that the labour officer had erred in his finding that the claimant was entitled to a domestic enquiry under s. 14(1) of the Employment Act 1955 ('the Act'). It was argued that the company had the right to dismiss the claimant instantly and without notice on the ground of 'misconduct inconsistent with the fulfilment of the express or implied conditions of his service'. On the other hand, it was argued for the claimant that his immediate dismissal without notice and without a due inquiry was a contravention of the rules of natural justice. The issue before the court was whether the claimant's failure to meet his sales targets amounted to a 'misconduct inconsistent with the fulfilment of the express or implied conditions of his service' such that the company was entitled to dismiss him without notice under s. 14(1)(a) of the Act.

Held (dismissing the appeal):

[1] 'Misconduct' is a question of fact and of law. In the instant case, 'misconduct' was never raised as a ground in the company's letter to the claimant terminating his services as a salesman. Indeed, the focus of the letter was on the need for the claimant to demonstrate a significant improvement in his work, and no time frame was given to the claimant to so improve. It would, therefore, be difficult to conclude that there was a breach of a legal duty on the part of the claimant which amounted to misconduct. (p 638 e-f)

[2] Even if there was probable misconduct on the part of the claimant, s. 14(1) of the Act would still require the company to conduct a 'due inquiry' to ascertain the ground of misconduct before it could dismiss the claimant without giving notice. The requirement for a 'due inquiry' under s. 14(1) of the Act is a statutory expression of the fundamental common-law principle of natural justice, audi alteram partem, a breach of which would vitiate the judicial or quasi-judicial decision made. In the context of s. 14(1) of the Act, 'due inquiry' includes the right of an employee, not only to a fair hearing and an opportunity to answer the charges brought against him, but also the right to make representations in mitigation of any punishment that is proposed by the domestic tribunal. (pp 638 g-h, 639 a-g & 640 a-c)

[Decision of labour officer upheld.]

Case(s) referred to:
Harmer v. Cornelius 141 ER 91 ***(refd)***
KJJ Cleetus v. Unipamol (Malaya) Sdn Bhd Kluang (Case No 74 of 1974) ***(foll)***
Menon v. The Brooklands (Selangor) Rubber Co Ltd [1968] 1 MLJ 15
Milan Auto Sdn Bhd v. Wong Seh Yen [1994] 2 MLJ 135 ***(foll)***
Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(foll)***
Siggs and Chapman (Contractors) Ltd v. Knight [1984] 13 IRLR 83 ***(refd)***
The Manager, Scudai Estate, Johor Bahru v. Narayanan [1960] 26 MLJ 162 ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 2(1), 14(1)(a)

For the employer - Azlinda Zakariah; M/s K Sila Dass & Partners
For the employee - Tony Tan Yew Peng; M/s YP Tan & Ong

Reported by Gan Peng Chiang

JUDGMENT

Appeal

This is an appeal by the appellant/employer ("the employer") against the decision of the labour officer who on 20 December 2002 ordered the employer to pay to the respondent/employee ("the employee") a sum of RM2,410.93 by way of pay in lieu of notice of termination and a sum of RM23,074.62 by way of termination benefits. The grand total sum amounts to RM25,485.55.

Facts Of The Case

The facts which are simple and straightforward are not controverted. The employee is a salesman of the employer, and comes within the First Schedule to the Employment Act 1955 read with s. 2(1) thereof. His contract of service with the employer was terminated on 30 September 2002 without due notice on ground of alleged misconduct ie, failure to achieve the employer's sales target.

The employer's letter of termination dated 30 September 2002, where relevant, stated that the employee's performance "has been below expectation" and that "you need to demonstrate significant improvement ... that you only managed to achieve 45% of the sales target in July and 61% in August 2002.

Prior to the said termination, the employee has been in the employment of the employer for 23 years and nine months.

A reference to any section in this judgment is a reference to that section in the Employment Act 1955 and a reference to the Act is a reference to the Employment Act 1955 unless the context otherwise requires.

Counsels' Submissions And Decision By Court

Cik Azlinda bte Zakariah, learned counsel for the employer, argued that the labour officer has erred in finding that the employee is entitled to a domestic inquiry under s. 14(1)(a) when the evidence showed that the employee's misconduct was such as to warrant instant dismissal, on the basis of the *The Manager, Scudai Estate, Johor Bahru v. Narayanan* [1960] 26 MLJ 162 HC.

She added that the employer is legally entitled to instantly dismiss the employee, relying on *Menon v. The Brooklands (Selangor) Rubber Co. Ltd.* [1968] 1 MLJ 15, which was upheld by the Federal Court, *sub nomin* [1968] 2 MLJ 186.

En. Tony Tan Yew Peng, learned counsel for the employee, contended that the instant dismissal of the employee without due notice and without due inquiry by the employer was in breach of the rules of natural justice. Reliance was placed on s. 13(1) and s. 14(1)(a), in addition to *Milan Auto Sdn Bhd v. Wong Sen Yen* [1994] 2 MLJ 135 HC.

It was also submitted for the employee that there was no misconduct on the part of the employee.

On the facts of the instant appeal and having regard to the respective submissions, it seems clear to me that the issue for determination is:

> Having regard to the Employment Act 1955, does the employee's failure to achieve the employer's sales target constitute misconduct which would entitle the employer to terminate the employee's service as a salesman without due notice and without due inquiry?

It is trite law that the onus of proving misconduct to justify dismissal without notice rests upon the employer: *The Manager, Scudai Estate, supra.*

The word "misconduct" has been judicially defined by Willes J in the judgment of the Court of Appeal in *Harmer v. Cornelius* 141 ER 91, at p. 98 as:

> The failure to afford the requisite skill which has been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct.

In *The Manager, Scudai Estate, supra*, the learned judge held that the wounding of rubber trees, other than by accident, constituted a breach of the skill required from an experienced tapper and, except in isolated instances, constituted misconduct. The facts there revealed a statement by the respondent that trees were wounded by him, the number being unknown to him, but he alleged that the wounding was not such as would have reduced the quantity of latex to be received from the trees during their life-time. There was extensive and dangerous wounding. There were warnings given to the employee that unless his work improved, he would have to look for a job elsewhere. There was continuation of work after those warnings, and clear evidence of fresh misconduct subsequent to the last warning on 25 August 1959 which not only in itself constituted grounds for instant dismissal but revived the misconduct. On those facts, Neal J set aside the labour officer's order made in favour of the employee and held that the employer was entitled in law to dismiss the respondent on 21 September 1959 without notice by reason of his misconduct.

A claim for damages based on wrongful dismissal became the issue in *Menon, supra,* where the employee was an estate conductor in the employer's estate since 1960. For the first five days of 1965, there were discrepancies between the net weights of latex from his division of the estate and the weights at the main factory. The estate manager *vide* letter dated 6 January 1965 pointed out the shortcomings and warned the employee against further carelessness and negligence. The employee refused to acknowledge receipt of it on a copy, and failed to see the manager personally at an appointed time. Two more requests were made to the employee to see the manager before the employee complied with the manager's wish to see him. At the interview, the employee again refused to sign a copy of the warning letter when requested. As a result he was suspended from duties on the same day, 7 January 1965. After protracted negotiations between the employee's solicitor and the employer, and later between the employee's union and the employer, the employer on 21 April 1965 served the employee with a written notice of dismissal for insubordination with effect from 8 January 1965 on ground of misconduct based on disobedience of the employer's lawful and reasonable orders.

Raja Azlan Shah J (now HRH Sultan of Perak) upheld the summary dismissal which was affirmed by the Federal Court in [1968] 2 MLJ 186.

In my view, the definition of misconduct revolves around a mixed question of law and fact.

The facts in those cases cited for the employer are substantially different from those in the instant appeal, as the issue of misconduct was never raised as a ground in the employer's letter dated 30 September 2002, purportedly terminating the service of the employee as a salesman. Indeed, the focus of that letter is on the employee's need to demonstrate significant improvement. No time frame was given to the employee to enable him to demonstrate significant improvement. That being the case, it is difficult for the labour officer or for me in this appeal to come to a conclusion that there is a breach of legal duty by the employee to constitute misconduct.

Even assuming for a moment that the employer has established misconduct, s. 14(1)(a) requires the employer to comply with the procedural requirement of due inquiry in the following words:

14. Termination of contract for special reasons

(1) An employer may, on grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:

(a) dismiss without notice the employee;

By way of illustration, where the service of an employee with a monthly salary of RM600 was terminated without any notice, Wan Adnan J (later PCA) held that the employer had violated s. 14(1), as an employee within the meaning of the Act could only be dismissed after due inquiry to ascertain the ground of misconduct: *Milan Auto Sdn Bhd, supra.*

It is to be observed that the due inquiry may be conducted by way of a domestic inquiry, but the Act does not provide for any rules to regulate the procedure to be followed by a presiding officer.

For the purposes of conducting a due inquiry under s. 14(1), I am of the view that it is salutary to follow the guidelines set out by the Industrial Court on 26 September 1975 in *KJJ Cleetus v. Unipamol (Malaya) Sdn Bhd Kluang* (Case No. 74 of 1974) as follows:

(a) The Inquiry is to be instituted as early as possible after suspension of the Complainant,

(b) The Complainant is to be given particulars of the misconduct, preferably in writing; and a reasonable time be given before the Inquiry to enable him to prepare his case,

(c) Wherever applicable, the Complainant is to be accompanied by his union or Committee representative, if any, at the Inquiry,

(d) The Inquiry is to be conducted, as far as possible, by such Officer/s as not directly connected with the investigation of the misconduct so as to give the hearing impartiality,

(e) Examination of relevant witnesses is to be allowed at the reasonable discretion of the Officer in charge of the Inquiry,

(f) Notes in the form of Question and Answers and the final decision are to be recorded to show that the Inquiry was proper and the decision arrived at was fair.

The principle that an employee within the meaning of the First Schedule to the Act read with s. 2(1), has under s. 14(1) a statutory right to "due inquiry" by his employer before being dismissed is supported by high authority: per Edgar Joseph Jr FCJ in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646 SC.

His Lordship added that for the purposes of s. 14, "due inquiry" includes the right to make reprsentations against the punishment proposed as a result of adverse findings by a domestic body. An employee should not only have the opportunity to present arguments on "liability" but also in mitigation of penalty. More particularly, any discretion as to punishment should preclude relaxation of the requirement of a fair hearing, which includes being afforded the opportunity to make a plea in mitigation, following *Siggs and Chapman (Contractors) Ltd v. Knight* [1984] 13 IRLR 83.

On my part, I would add that the requirement for a due inquiry under s. 14(1)(a) is a statutory expression of the first fundamental principle of the common law rules of natural justice ie, *audi alteram partem* (hear the other side) or no man shall be condemned unheard. A breach of this fundamental rule would vitiate a judicial or quasi judicial decision. This principle is so trite and settled that there is hardly any need to cite any authority in support thereof.

For the employee who has served the employer for 23 years and nine months, the length of the notice of termination is regulated by s. 12(2)(c) in the following words:

> (2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than:
>
> (c) eight weeks' notice if he has been so employed for five years or more on such date;

Hence the employee who has been in the employment of the employer for 23 years nine months, is entitled to eight weeks' notice.

Where no due notice of termination has been given, as in the instant appeal, s. 13(1) contains provisions regulating the payment of indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice, in the following words:

> (1) Either party to a contract of service may terminate such contract of service without notice ... by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice ...

It seems to me that there is no dispute as to the computation of the labour officer's award of RM25,488.55.

On the foregoing grounds, the answer to the aforesaid issue for determination is obviously in the negative and so I hold that the labour officer's decision is correct and is hereby upheld. The appeal is therefore dismissed with costs.